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IN THE
COURT OF APPEALS OF INDIANA

ANTHONY HICKMAN,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 20A03-0611-CR-547
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ELKHART SUPERIOR COURT
The Honorable George W. Biddlecome, Judge
Cause No. 20D03-0603-FB-15

August 23, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

SHARPNACK, Judge

Anthony Hickman appeals his conviction and sentence for delivery of a schedule II controlled substance as a class B felony.[1] Hickman raises five issues, which we revise and restate as:

I. Whether the trial court abused its discretion by admitting into evidence an audio recording of the controlled buy between Hickman and a confidential informant;

II. Whether the trial court abused its discretion by allowing rebuttal testimony;

III. Whether Hickman was denied the effective assistance of counsel;

IV. Whether the trial court failed to permit Hickman to present a defense; and

V. Whether the trial court abused its discretion in sentencing Hickman.

We affirm.

The relevant facts follow. The Goshen Police Department arranged a controlled buy using a confidential informant. On August 31, 2005, the police searched the informant and his vehicle to ensure that he did not have any contraband and gave the informant a recording device and $300 that had previously been photocopied. The $300 was for a debt of $140 and $160 for the drug buy.

The informant knocked on the door of Hickman's trailer and was met by Hickman's mother, who motioned him to come inside. Hickman, Pam Tinsley, Hickman's girlfriend, Tinsley's daughter, Tony Knight, and Dennis Books were present.

[1] Ind. Code § 35-48-4-2 (2004).

Hickman and the informant went to the back bedroom of the residence. The informant gave Hickman the $300. Hickman "separate[ed]" the methamphetamine. Transcript at 235-236. Hickman had two baggies of methamphetamine and handed the informant the smaller baggie of methamphetamine. The informant asked for the larger baggie, but Hickman told the informant that the larger baggie contained half an ounce and the informant had only paid for a quarter of an ounce. Hickman told the informant that his debt had been paid, and the informant left the residence. The informant walked directly to his vehicle and drove to meet the police. The informant gave the police the baggie containing 5.98 grams of methamphetamine, and the police searched the informant and the vehicle again.

The State charged Hickman with delivery of a schedule II controlled substance as a class B felony. At the jury trial, Hickman's theory of the case was that the informant and Knight were alone together and that Hickman was in the living room in view of the others in the home and was on the phone.

Hickman objected to the State's attempt to enter the audio recording of the controlled buy into evidence because the recording was "not understandable in large part" and would result in "so much confusion in the jury's minds in that under Rule 403, because there is [sic] unintelligible parts – and I don't think a jury can make an accurate assessment of the total tape itself." Id. at 185. The trial court indicated that it would listen to the recording that evening to determine if the recording could be misleading or not helpful to the jury. The next morning, the State moved to admit the recording, and

the trial court admitted it over Hickman's objection. A portion of the recording was played, specifically from the time the informant knocked on the door to when the informant left the trailer, which was from "16:00-26:37" on the recording. Id. at 247.

The prosecutor played a portion of the recording, specifically from 18:45 to 19:20. The informant testified that he and Hickman were discussing money and that he gave Hickman $300. The prosecutor played another portion of the recording from 24:00 to 24:20. The recording reveals a voice that states, "The only reason why I didn't give you that cause there was a half ounce in there instead of a quarter." State's Exhibit 3 at 24:07. The informant identified Hickman's voice and stated "[t]hat's when he was giving me the dope." Transcript at 254. The prosecutor played another portion of the recording from 26:30 to 26:45. The informant identified Hickman's voice in the context of "[Hickman] said we was straight. We were good. My debt was paid." Id. at 254.

Upon the close of the informant's testimony, a juror requested to listen to the recording during deliberations. The parties did not object to the trial court's statement that "[i]f the jury wishes to listen to the disk during deliberations, arrangements will be made by the Court for you to do so." Id. at 287.

The prosecutor asked Goshen Police Officer Shawn Turner why an undercover officer was not involved in the controlled buy. In part, Officer Turner testified that "as much as the cooperating source believed that certain individuals are too street smart and too wise to the idea of somebody new being introduced into someone that hadn't grown

up with them in a geographical area, hadn't known their family, hadn't maybe, you know, hypothetically been to prison with them or something to that nature." Id. at 304.

Outside the presence of the jury, the trial court asked Hickman's attorney if he intended to ask Knight if he sold drugs to the informant, and Hickman's attorney indicated that he did not plan on asking him that question but that he intended to ask Knight whether he had sold drugs to the informant in the past. The trial court indicated that such questioning would occur outside the presence of the jury. Hickman's attorney conducted a direct examination of Knight, and Knight testified that he remembered "[n]othing." Id. at 437. Hickman's attorney did not pursue questioning Knight outside the presence of the jury.

Hickman testified that the voice on the recording making the statement about the quarter ounce and half ounce was Knight. The prosecutor recalled Officer Turner as a rebuttal witness to testify as to whose voice was on the recording. Hickman's attorney asked that the initial questions be heard outside the presence of the jury because a "prosecuting attorney can – in laying the question would have the answer – it imparts to the jury that it is his opinion, just by starting to lay the foundation, to be able to give it." Id. at 510. Hickman's attorney also objected to the proposed rebuttal testimony because: (1) "it is a violation of Indiana Rule of Evidence 401" because "[i]t does not contradict the evidence offered by the [Hickman];" (2) "[i]t is violation [sic] of Rule 402 and 403, that the prejudice of the opinion under these circumstances is extremely prejudicial to [Hickman];" (3) "it's a violation of Rule 701 in reference to an opinion by a lay witness

under the facts and circumstances of this case;" and (4) "under 702, if a lay jury could reach the same opinion as an expert's conclusion without the expert's opinion, it should not be admitted." Id. at 517-519. The trial court held that the identification of the voice on the recording was a proper subject for rebuttal and allowed the prosecutor to lay a foundation.

Officer Turner testified that he spoke to Hickman "face-to-face" for "between five and ten minutes." Id. at 537. Officer Turner also testified that he was deposed by Hickman during a three to four hour deposition when Hickman was representing himself. Officer Turner testified that he listened to "hours" of other recordings of Hickman's voice. Officer Turner testified that based on his knowledge of Hickman's voice he was able to identify Hickman's voice as the one that made the statement "with regard to quarter ounce versus a half ounce." Id. at 538.

On August 2, 2006, the jury found Hickman guilty of delivery of a schedule II controlled substance as a class B felony. As the jury was walking into the courtroom with the verdict, Hickman informed his trial counsel that the jury had seen him in handcuffs and belly chains. The trial court found Hickman's criminal history, violations of parole, and the fact that he was on parole at the time that he committed the offense as aggravating circumstances. The trial court found Hickman's addiction to illicit drugs as a mitigator, but the trial court declined to give substantial weight to the mitigator because Hickman had failed to address his addiction. The trial court sentenced Hickman to seventeen years in the Indiana Department of Correction. On August 14, 2006, the trial

court received a hand written note from Hickman regarding the manner in which he was transported to court during his trial.

I.

The first issue is whether the trial court abused its discretion by admitting into evidence a recording of the controlled buy between Hickman and the informant. Because the admission and exclusion of evidence falls within the sound discretion of the trial court, we review the admission of testimony only for abuse of discretion. Wilson v. State, 765 N.E.2d 1265, 1272 (Ind. 2002). An abuse of discretion occurs "where the decision is clearly against the logic and effect of the facts and circumstances." Smith v. State, 754 N.E.2d 502, 504 (Ind. 2001).

Generally, "[t]o properly admit a tape recording made in a non-custodial setting, the following foundational requirements must be established: (1) the recording must be authentic and correct; (2) the testimony elicited must have been freely and voluntarily made; (3) the recording must not contain matter otherwise not admissible into evidence; and (4) the recording must be of such clarity as to be intelligible and enlightening to the jury." Coleman v. State, 750 N.E.2d 370, 372-373 (Ind. 2001). "[E]very word of a recording need not be intelligible. Rather, the tape recording, taken as a whole, must be of such clarity and completeness to preempt speculation in the minds of the jurors as to its content." Dearman v. State, 743 N.E.2d 757, 762 (Ind. 2001) (internal citation omitted). "[T]he standard of quality expected of a recording in an interrogation room cannot be used to judge a recording of a person wearing a 'bug.'" Fassoth v. State, 525

N.E.2d 318, 324 (Ind. 1988). "The trial court has wide discretion in deciding whether to admit a tape recording as evidence." Dearman, 743 N.E.2d at 762.

"Prejudice to a defendant may result from the admission of a partly unintelligible audio tape when it is used to bolster the credibility of a vulnerable witness, such as a police informant with a criminal record." Lahr v. State, 640 N.E.2d 756, 761 (Ind. Ct. App. 1994), trans. denied. "The intelligible portions of the tape may corroborate part of the informant's story, but the jury is forced to speculate as to the unintelligible portions of the tape and may assume that the tape confirms the informant's entire story." Id.

While portions of the recording are unintelligible,[2] the recording reveals a voice that states, "The only reason why I didn't give you that cause there was a half ounce in there instead of a quarter." State's Exhibit 3 at 24:07. The informant identified the voice as belonging to Hickman. Officer Turner also identified the voice as belonging to Hickman. We conclude that the recording is relevant evidence, and the trial court did not abuse its discretion by admitting the recording. See Davies v. State, 730 N.E.2d 726, 735 (Ind. Ct. App. 2000) (holding that admission of tapes was within the discretion of the trial court and tapes were relevant, authentic, and sufficiently audible to be helpful to the jury).

[2] The recording reveals an exchange of greetings, background conversation, a telephone conversation in the background, what appears to be a television program in the background, and the informant urinating.

To the extent that the recording was admitted for the purpose of indicating that a drug deal occurred, even assuming that the trial court erred by admitting the recording, any error is harmless. Error in the admission of evidence may be harmless when the evidence is merely cumulative of other properly admitted evidence. Witte v. Mundy ex rel. Mundy, 820 N.E.2d 128, 135 (Ind. 2005). Additionally, "[h]armlessness is ultimately a question of the likely impact of the evidence on the jury." Id.

Goshen Police Officer Jose Miller testified that he searched the informant to insure he did not have any contraband before the informant entered the trailer. Officer Miller also testified that the informant gave him the methamphetamine after the informant exited the trailer. The informant testified that he did not have any drugs on his person or in his vehicle and that the police searched him and his vehicle. The informant also testified that he gave Hickman $300 and Hickman gave him a baggie of methamphetamine. Hickman admitted that money changed hands. Under these circumstances, even assuming that the trial court erred by admitting the recording, the recording did not place Hickman in grave peril, as any speculation by the jury as to the recording's contents would not have added anything to the other evidence available to them. See Roller v. State, 602 N.E.2d 165, 171 (Ind. Ct. App. 1992) (holding that an erroneously admitted tape did not place defendant in grave peril), trans. denied.

II.

The next issue is whether the trial court abused its discretion by allowing rebuttal testimony. On appeal, Hickman argues that Officer Turner's rebuttal testimony was

"unfairly harmful and prejudicial under Indiana Rule of Evidence 403."[3] Appellant's Brief at 17. Hickman argues that the trial court allowed Officer Turner to testify to "his opinion as to the contents of the audio CD recording of the alleged drug transaction involving Anthony Hickman." Id. at 17. Hickman argues that "any lay person, i.e, [sic] a juror, could make that or render an opinion simply by listening to the audio CD recording if it is intelligible. The audio CD recording was not intelligible in Mr. Hickman's case. Therefore, Officer Tuner's [sic] opinion in his rebuttal testimony should not have been allowed by the trial court." Id. Hickman's argument is unclear. Officer Turner testified only as to the identification of the voice on the recording. Hickman fails to cite to the transcript, develop his arguments, or cite to authority. Therefore, Hickman has waived this argument. See, e.g., Flynn v. State, 702 N.E.2d 741, 744 (Ind. Ct. App. 1998) (holding that the defendant waived his argument by failing to present a cogent argument or cite to authority), reh'g denied, trans. denied.

III.

The next issue is whether Hickman was denied the effective assistance of counsel. To prevail on a claim of ineffective assistance of counsel, a defendant must demonstrate both that his counsel's performance was deficient and that the defendant was prejudiced

[3] Ind. Evidence Rule 403 states that "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence."

by the deficient performance. Ben-Yisrayl v. State, 729 N.E.2d 102, 106 (Ind. 2000) (citing Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984), reh'g denied), reh'g denied, cert. denied, 534 U.S. 830, 122 S. Ct. 73 (2001). A counsel's performance is deficient if it falls below an objective standard of reasonableness based on prevailing professional norms. French v. State, 778 N.E.2d 816, 824 (Ind. 2002). To meet the appropriate test for prejudice, the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Id. Failure to satisfy either prong will cause the claim to fail. Id. Most ineffective assistance of counsel claims can be resolved by a prejudice inquiry alone. Id.

Hickman argues that his trial counsel: (A) failed to inform the trial court that jurors observed Hickman in shackles and in law enforcement custody during the trial; (B) failed to object to the jurors listening to the recording in the jury room; (C) failed to object to Officer Turner's testimony; (D) failed to object to the prosecutor's motion to publish the recording; and (E) failed to sufficiently investigate the existence of mitigating factors. We will address each argument separately.

A. Shackles

Hickman argues that "prior to the jury returning with its verdict, Anthony Hickman notified [trial counsel] that jurors had observed him in shackles and in the custody of law enforcement during his jury trial" and that "[w]ith this knowledge of the jurors having seen Mr. Hickman in shackles and in the custody of law enforcement

throughout the jury trial, [trial counsel] did not notify the Court as to this situation which was highly prejudicial to Mr. Hickman." Appellant's Brief at 18.

"As a general rule, a criminal defendant has the right to appear before the jury without bonds or shackles." Forte v. State, 759 N.E.2d 206, 208 (Ind. 2001). "[R]easonable jurors could expect [defendants] to be in police custody while in the hallway of the courthouse." Jenkins v. State, 492 N.E.2d 666, 669 (Ind. 1986) (citing Johnson v. State, 267 Ind. 256, 369 N.E.2d 623 (1977), cert. denied, 436 U.S. 948, 98 S.Ct. 2855 (1978)). "The fact that a defendant has been seen by jurors while being transported in handcuffs is not a basis for reversal, absent a showing of actual harm." Bergfeld v. State, 531 N.E.2d 486, 491 (Ind. 1988) (relying on Jenkins, 492 N.E.2d 666).

Hickman did not inform his trial counsel that the jury had seen him in handcuffs until "the jury was walking in with the verdict." Sentencing Transcript at 3. Hickman also failed to specify when the jury had seen him in handcuffs. Hickman has failed to demonstrate any prejudice, and his claim of ineffective assistance of trial counsel on this basis fails. See Bergfeld, 531 N.E.2d at 491 ("Even if there was evidence that the jurors did in fact see him handcuffed, appellant has shown no prejudice because jurors would reasonably expect that anyone in police custody would be restrained, regardless of the nature of the charge against the accused.").

B. Audio Recording in Jury Room

Hickman argues that trial counsel was ineffective for failing to object to the jurors being allowed to listen to the recording in the jury room during its deliberations.

Hickman fails to develop his argument or cite to authority to support the proposition that the jury could not listen to the recording during deliberations. Therefore, Hickman has waived this argument. See, e.g., Flynn, 702 N.E.2d at 744 (holding that defendant waived his argument by failing to present a cogent argument or cite to authority).

C. Officer Turner's Testimony

Hickman argues that his trial counsel was ineffective for failing to object to Officer Turner's testimony "describing individuals involved in drug dealing as being street smart and not wanting to be introduced to individuals that they hypothetically had not been to prison with." Appellant's Brief at 20. Hickman argues that this testimony was prejudicial because the comment "conveyed to the jury that Mr. Hickman had been involved in criminal activity for a considerable amount of time and had most likely spent time in prison." Id.

Hickman directs our attention to the following exchange that occurred during the direct examination of Officer Turner:

> Q Was this particular occasion then, August 31 of 2005, one of those times when an undercover officer was introduced into the actual buy itself?
>
> A No, it was not.
>
> Q Why is that?
>
> A There are various reasons why we will not either have an undercover officer – I will explain the first reason. Sometimes there is an officer safety issue, and we are always concerned that there had been prior

> dealings with the officer and the suspect that we are going after. A lot of these guys come out of patrol so they were wearing a uniform at one time and we are always afraid that maybe somebody will recognize them from the past. So we are very cautious with how we approach in certain situations.
>
> Other times when we are gathering intelligence and looking at the overall picture of who we are going after, there could be issues with is this person extremely violent? Is this person someone that can do harm to us or cause an officer not to come home at night? We take all of those things into consideration and sometimes we choose not to have an officer go along.
>
> In this specific incident, the officer was not – and this is another reason why – accompanying the cooperating source because we believed as long as, as much as the cooperating source believed that certain individuals are too street smart and too wise to the idea of somebody new being introduced into someone that hadn't grown up with them in a geographical area, hadn't known their family, hadn't maybe, you know, hypothetically been to prison with them or something to that nature. So that was where a decision was made specifically on this incident.

Transcript at 303-304.

Counsel reasonably could have decided that objecting to Officer Turner's testimony would draw undue attention to the comments. This choice was a reasonable strategic decision. See Saylor v. State, 765 N.E.2d 535, 551 (Ind. 2002) ("[C]ounsel reasonably could have decided that objecting to the State's comments, interspersed at different places in the argument, would draw undue attention to them. This choice was a reasonable strategic decision."), reversed on other grounds on reh'g, 808 N.E.2d 646; Brim v. State, 624 N.E.2d 27, 37 (Ind. Ct. App. 1993) (holding that defendant's attorney may have elected to proceed with examination of witness rather than drawing the jury's

attention to it by requesting an admonishment and that this was an appropriate trial strategy, which could not serve as the basis for a claim of counsel ineffectiveness).

D. Audio Recording

Hickman argues that his trial counsel was ineffective for failing to object to the prosecutor's motion to publish the recording "even though there was witness testimony describing this recording as unintelligible." Appellant's Brief at 20. As previously mentioned, trial counsel made numerous objections to the recording. Because trial counsel objected to the recording, Hickman's claim of ineffective assistance on this basis fails.

E. Mitigating Factors

Hickman's entire argument consists of one sentence, "[trial counsel] did not sufficiently investigate the existence of mitigating factors for Mr. Hickman." Appellant's Brief at 20. Failure to adequately develop an argument or provide adequate citation to authority and portions of the record results in the waiver of the issue on appeal. See Lyles v. State, 834 N.E.2d 1035, 1050 (Ind. Ct. App. 2005), trans. denied. Hickman has therefore waived this issue.

IV.

The next issue is whether the trial court failed to permit Hickman to present a defense. A defendant has a right to present evidence tending to show that someone other than the accused committed the charged crime and that the exclusion of such evidence by

the trial court "appears inconsistent with substantial justice and therefore cannot be deemed harmless error." Joyner v. State, 678 N.E.2d 386, 390 (Ind. 1997), reh'g denied.

We review the trial court's ruling on the admission of evidence for an abuse of discretion. Noojin v. State, 730 N.E.2d 672, 676 (Ind. 2000). The decision whether to admit evidence will not be reversed absent a showing of manifest abuse of a trial court's discretion resulting in the denial of a fair trial. Brand v. State, 766 N.E.2d 772, 778 (Ind. Ct. App. 2002), trans. denied. Generally, errors in the admission or exclusion of evidence are to be disregarded as harmless unless they affect the substantial rights of a party. Coleman v. State, 694 N.E.2d 269, 277 (Ind. 1998). In determining whether an evidentiary ruling affected a party's substantial rights, the court assesses the probable impact of the evidence on the trier of fact. Id. However, as noted above, if error results from the exclusion of evidence that indicates that someone else had committed the crime, the error cannot be deemed harmless. See Joyner, 678 N.E.2d at 390.

"Failure to make an offer of proof of the omitted evidence renders any claimed error unavailable on appeal unless it rises to the level of fundamental error." Young v. State, 746 N.E.2d 920, 924 (Ind. 2001). To rise to the level of fundamental error, an error "must constitute a blatant violation of basic principles, the harm or potential for harm must be substantial, and the resulting error must deny the defendant fundamental due process." Maul v. State, 731 N.E.2d 438, 440 (Ind. 2000).

Hickman argues that the trial court committed fundamental error "by preventing trial defense counsel from asking any question to Anthony Knight likely to cause Mr.

Knight to elicit his right against self-incrimination in front of the jury." Appellant's Brief at 21. Specifically, Hickman argues that "[t]he inability of Mr. Hickman's trial defense counsel to question Mr. Knight in the presence of the jury concerning whether he was the individual who delivered the illegal substance to the confidential informant prevented Mr. Hickman from presenting an important element of his defense to the jury." Id. at 21-22. However, Hickman's attorney indicated that he did not plan on asking Knight whether he sold drugs on the day in question, and Hickman fails to argue what testimony Knight would have provided to such a question. Hickman's attorney conducted a direct examination of Knight, and Knight remembered "[n]othing" about the day in question, and Hickman's attorney did not question Knight outside the presence of the jury. Transcript at 436. Without this evidence, we cannot determine whether a fundamental error occurred. See, e.g., Young v. State, 746 N.E.2d 920, 924 (Ind. 2001) (holding that the record was unclear what evidence defendant would have presented and that "[a]s a result, we cannot determine that the result of his trial was unfair").

V.

The next issue is whether the trial court abused its discretion in sentencing Hickman.[4] We note that Hickman's offense was committed after the April 25, 2005,

[4] Hickman raises the issue of whether his sentence was "excessive and unreasonable" under the circumstances. Appellant's Brief at 1. To the extent that Hickman is attempting to argue that his sentence is inappropriate, he makes no argument as to why his sentence is inappropriate in light of the nature of the offense and the character of the offender. Therefore, the argument is waived for failure to make a cogent argument. See Ind. Appellate Rule App. R. 46(A)(8)(a); Ford v. State, 718 N.E.2d 1104, 1107 n.1 (Ind. 1999).

revisions of the sentencing scheme. In clarifying these revisions, the Indiana Supreme Court has held that "the trial court must enter a statement including reasonably detailed reasons or circumstances for imposing a particular sentence." Anglemyer v. State, 868 N.E.2d 482, 490 (Ind. 2007). We review the sentence for an abuse of discretion. Id. An abuse of discretion occurs if "the decision is clearly against the logic and effect of the facts and circumstances." Id.

A trial court abuses its discretion if it fails "to enter a sentencing statement at all," enters "a sentencing statement that explains reasons for imposing a sentence – including a finding of aggravating and mitigating factors if any – but the record does not support the reasons," enters a sentencing statement that "omits reasons that are clearly supported by the record and advanced for consideration," or considers reasons that "are improper as a matter of law." Id. at 490-491. If the trial court has abused its discretion, we will remand for resentencing "if we cannot say with confidence that the trial court would have imposed the same sentence had it properly considered reasons that enjoy support in the record." Id. at 491. However, under the new statutory scheme, the relative weight or value assignable to reasons properly found, or those which should have been found, is not subject to review for abuse of discretion. Id.

Hickman appears to argue that the trial court abused its discretion "[i]n assessing the weight to be given to mitigating factors, the Court did not give substantial weight to Mr. Hickman's addiction to illicit drugs." Appellant's Brief at 23. Hickman also argues that "[t]he Court should have placed more weight on Mr. Hickman's addiction to illegal

drugs considering the length of time that Mr. Hickman has been addicted to illegal drugs and the likely impact of the drugs on his behavior and decision-making." Id.

The trial court considered Hickman's addiction to drugs as a mitigator but declined to give it substantial weight because Hickman "was fully aware of that addiction from the time of his diagnosis as a drug addict in September of 2001 and has failed to address that addiction meaningfully in the interim." Sentencing Transcript at 7. Hickman asks us to review the weight given to a mitigating factor for abuse of discretion, which we cannot do. See Anglemyer, 868 N.E.2d at 491 (holding that the relative weight or value assignable to aggravating and mitigating factors properly found is not subject to review for abuse of discretion).

For the foregoing reasons, we affirm Hickman's conviction and sentence for delivery of a schedule II controlled substance as a class B felony.

Affirmed.

MAY, J. and BAILEY, J. concurs